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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 RAMON BARCIA, on behalf of himself and
12 all persons similarly situated,

13 Plaintiff,

14 vs.

15 CONTAIN-A-WAY, Inc.,

16 Defendant.
17

CASE NO. 07cv938-IEG-JMA

**ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION FOR
DEFENDANT TO PROVIDE
EVIDENCE OF COMPLIANCE
WITH SETTLEMENT
AGREEMENT**

(Doc. No. 37)

18
19 On July 22, 2009, Plaintiffs filed the instant motion for an order directing Defendant to provide
20 evidence to the Court of compliance with the settlement agreement that led to the dismissal of this
21 case on the merits. (Doc. No. 37.) Plaintiffs also seek ERISA civil enforcement penalties, as further
22 described below. Defendant has filed an opposition and Plaintiffs have filed a reply. The Court heard
23 oral argument the motion on Monday, August 31, 2009.

24 **BACKGROUND**

25 **I. Factual and Procedural Background**

26 From 2003 until 2008, defendant Contain-a-Way, Inc., doing business as Nexcycle, operated
27 a business which recycled aluminum, glass, and plastic using small kiosks or trailers located behind
28 large grocery stores or other retail stores. The recycling sites were manned by "Site Attendants" or
"Floaters" who received the recyclables, weighed the materials, and paid clients with cash or credit

1 according to the weight and material price.¹ Nexcycle stored the recyclables at the recycling sites and
2 picked up the matter periodically. The company required employees to perform a series of tasks
3 before opening and after closing the site to public, but allegedly failed to compensate Site Attendants
4 and Floaters for this pre-opening and post-closing work. In addition, Plaintiffs contend they were
5 denied certain profit-sharing 401k benefits to which they were entitled.

6 On April 19, 2007, Plaintiff Randall Lewis filed a complaint entitled Randall Lewis, et al. v.
7 Contain-A-Way, et al., civil action no. 37-2007- 00065322, in Superior Court for the County of San
8 Diego, on behalf of himself and all other similarly situated site attendants. (Blumenthal Decl. ISO
9 Plt.'s Motion for Final Approval of Class Settlement, Doc. No. 30-4, ¶ 6(a).) Mr. Lewis sought unpaid
10 wages and penalties for missed rest breaks.

11 On May 23, 2007, Plaintiff Ramon Barcia filed the instant action on behalf of himself and all
12 other similarly situated site attendant and floater employees. Mr. Barcia sought unpaid wages and
13 penalties for missed rest breaks as well as a claim for ERISA benefits.

14 After extensive discovery in both actions, on April 4, 2008, Mr. Barcia amended his complaint
15 to add Mr. Lewis as a plaintiff. Following the amendment, Mr. Lewis dismissed the state action
16 without prejudice in order to proceed solely in the federal court where all claims could be redressed.

17 The Amended Complaint alleges Defendants (1) failed to pay earned wages and overtime
18 compensation; (2) failed to provide rest periods; (3) failed to provide accurate itemized statements;
19 (4) violated California Business and Professions Code §17200 which prohibits unfair competition; (5)
20 failed to pay ERISA benefits; and (6) violated the fair labor standards act, 29 U.S.C. § 216.
21 Additionally, plaintiffs requested civil damages under California's Private Attorney General Act, Cal.
22 Labor Code §2698.

23 After extensive discovery and multiple meet and confer sessions, the parties agreed to submit
24 to mediation before nationally recognized labor mediator Mark Rudy on April 2, 2008. The parties
25 reached an agreement after day-long negotiations. The stipulated settlement agreement contained the
26 following provision: "The Parties agree that upon final approval by the Court, this Stipulation shall

27
28 ¹ There is no meaningful difference between the work performed by Site Attendants and
Floaters. Site Attendants are employees who work at a regular recycling site and Floaters are
employees who worked different sites as needed and directed by defendant.

1 be enforceable by the Court and the Court shall retain exclusive and continuing equity jurisdiction of
2 this action over all Parties and Class Members to interpret and enforce the terms, conditions, and
3 obligations set forth in this Stipulation.” [Stipulation of Class Action Settlement (“Settlement
4 Agreement”), Ex. 1 to Blumenthal Decl. ISO Motion for Order (“Blumenthal Decl.”), Doc. No. 37-3,
5 pp. 23-24.] The Settlement Agreement also provided that Gilardi & Co., LLC would serve as claims
6 administrator “for the purpose of administering timely claims made by eligible Class Members in
7 accordance with this Stipulation.” (Settlement Agreement at 12.)

8 On August 15, 2008, the Court granted preliminary approval of the settlement. On September
9 2, 2008, plaintiffs mailed the notice of settlement (“Class Notice”) to 2,385 current and former
10 employees who comprise the class. The Class Notice provided class members with an opportunity
11 to file a claim for monetary relief, opt out of the settlement, or object to the settlement. (Solorzano
12 Decl. ISO Plt.’s Motion for Final Approval of Class Settlement, Doc. No. 30-3, ¶¶ 3-6.) On or before
13 October 1, 2008, plaintiffs mailed a reminder postcard to class members who had not yet responded.
14 Id. Only 478 class members submitted timely claims for unpaid work, 56 class members opted out,
15 and no one objected. Id. at ¶¶ 8-10.

16 II. The Settlement

17 On March 6, 2009 the Court issued an order granting Plaintiffs’ motion for: (1) final approval
18 of class settlement; (2) entry of final judgment; (3) award of attorneys’ fees; and (4) allowing service
19 awards to class representatives. (Doc. No. 34.) In the Court’s separate judgment and order of final
20 approval of the settlement, the Court retained “exclusive and continuing jurisdiction over the
21 Litigation, Plaintiffs, all Class Members and Defendant, for purposes of supervising, implementing,
22 interpreting and enforcing this Order and the Settlement Agreement.” [Judgment and Order of Final
23 Approval of the Settlement and Dismissing Action (“Dismissal Order”), Doc. No. 35.]

24 The Settlement Class consisted of “all individuals employed as Site Attendant and/or Floaters
25 by Nexcycle in California at any time from May 23, 2003 and the date of preliminary approval of the
26 settlement by the Court [August 15, 2008], and who do not file a timely request to be excluded from
27 the settlement class.” Without admitting class certification was proper, Defendant stipulated that the
28 class could be certified for settlement purposes. (Blumenthal Decl. ISO Plt.’s Motion for Final

1 Approval of Class Settlement, Doc. No. 30-4, ¶ 6(b).)

2 In consideration for settlement and a release of the claims, Nexcycle agreed to pay the class
3 \$2,500,000, including attorneys' fees, payment of the ERISA claim, the named Plaintiffs service
4 awards, the costs of settlement administration, and the "Private Attorneys General Act" award to the
5 California Labor and Welfare Development Agency ("The Settlement Amount"). (Blumenthal Decl.
6 ISO Plt.'s Motion for Final Approval of Class Settlement, Doc. No. 30-4, ¶ 3(a).)

7 The instant motion concerns Defendant's compliance with the settlement terms of the ERISA
8 claim. The relevant terms of the Agreement state:

9 The ERISA claim shall be settled by application of the Self-Correction
10 Method set forth in the Internal Revenue Service's Revenue Procedure
11 2006-27, Appendix A ("the ERISA Settlement Consideration"), which
12 will result in the establishment of and/or contribution to
13 401(k)/retirement accounts for eligible Class Members in amounts
14 equal to their individual missed deferral opportunities. To obtain any
15 benefits that may be vested in a 401(k)/retirement account, Class
16 Members must contact Fidelity NetBenefits® at www.401k.com or call
17 the Fidelity Retirement Benefits Line at 1-800-835-5097. Class
18 Members are not required to submit any claim in order to obtain those
19 vested benefits. The remaining claims for relief alleged in the First
20 Amended Complaint, which include all claims for violation of the
21 Labor Code, the Business and Professions Code and the Fair Labor
22 Standards Act, shall be settled for a monetary amount to be paid out of
23 a settlement fund in a bank account established by a Claims
24 Administrator.

25 (Settlement Agreement at 5-6.)

26 The parties calculated the amount of the individual missed deferral opportunities to be
27 \$209,358. There were 753 Class Members who were denied ERISA benefits but who were allegedly
28 eligible for the Nexcycle 401(k) Profit Sharing Plan (the "Plan") because they had completed more
than 1,000 hours of service. See 29 U.S.C. § 1052(a)(1)(A)(ii), (3)(A).

29 III. Establishment of the Retirement Accounts

30 Defendant has provided Plaintiffs with a "Plan History Detail" printout from Fidelity
31 Investments ("Fidelity") purporting to show the transfer of \$208,800.14 to a Fidelity Account made
32 on September 11, 2008. (Ex. 4 to Blumenthal Decl.) Defendant explains that "[t]he actual amount
33 of the corrective contribution was slightly less than the original amount of \$209,358 because there
34 were employees on the original list who were under the age of 21 and therefore did not meet the
35 eligibility requirements." (Opp. at 1, n. 1.)

1 The briefing on this motion has also revealed that Mr. Barcia's retirement account became
 2 inactive approximately three months after it was established because his account balance of \$155.04
 3 was below the Plan's minimum required balance of \$1000. [Comer² Decl. ISO Opp. ("Comer
 4 Decl."), ¶¶ 4-5.] Specifically, Defendant contends (1) Fidelity informed Mr. Barcia by letter sent to
 5 his address of record that his retirement account balance fell below the Plan's required minimum
 6 balance of \$1,000, and instructed him to elect a direct rollover of funds if he did not desire a cash
 7 payout;³ (3) Mr. Barcia never contacted Fidelity to request a direct rollover; and (4) Fidelity mailed
 8 a payout check to Mr. Barcia at his address of record that was never cashed. (Opp. at 10; Comer
 9 Decl., ¶¶ 4-11.) Defendant also states that given the relatively small payments into the eligible class
 10 members' retirement accounts, the vast majority of those class members probably received "*de*
 11 *minimus*" notifications and cash payouts similar to those Mr. Barcia received. (Opp. at 10.)

12 IV. Relevant Post-Settlement Interactions Between the Parties

13 On March 24, 2009, Plaintiffs' counsel requested information regarding the establishment of
 14 the retirement accounts, specifically asking defense counsel for "confirmation as to the ERISA
 15 deposits and notice to the class members of the deposits on their behalf." (March 24, 2009 email from
 16 Norman Blumenthal to Lena Sims, Ex. 2 to Blumenthal Decl.) Defense counsel responded she did
 17 not believe the Settlement Agreement covered such information. (March 25, 2009 email from Lena
 18 Sims to Norman Blumenthal, Ex. 3 to Blumenthal Decl.)

19 In response, Plaintiffs' counsel requested proof that "each and every ERISA payment has been
 20 made and each and every class member for whom a payment was made has been informed of his rights
 21 thereto." (March 25, 2009 email from Norman Blumenthal to Lena Sims, Ex.3 to Blumenthal Decl.)
 22 On April 7, 2009 Plaintiffs' counsel repeated this request and additionally asked for "evidence of how
 23 and in what way [eligible class members] will be informed as to the amount in the plan for each of
 24 them on an ongoing basis." (April 7, 2009 email from Norman Blumenthal to Lena Sims, Ex. 4 to
 25 Blumenthal Decl.)

27 ² Jason Comer declares he is an employee of Fidelity Investments, and is the administrative
 28 recordkeeper for the Strategic Materials Employee Retirement Plan. (Comer Decl., ¶ 1.)

³ See Ex. A to Comer Decl. (Doc. No. 41-2.)

1 Defendant responded on April 10, 2009 with the Fidelity “Plan History Detail.” Viewing this
 2 response as unsatisfactory, on April 20, 2009 Plaintiffs’ counsel made a final request for copies of the
 3 eligible class members’ individual quarterly benefit statements pursuant to “ERISA 19 USC 1025(a)”
 4 and requested that the statements also show the amount of the deposits made into each individual plan
 5 account pursuant to the Settlement Agreement. (April 20, 2009 email from Norman Blumenthal to
 6 Lena Sims, Ex. 5 to Blumenthal Decl.) Defendant did not provide the requested information.

7 DISCUSSION

8 Plaintiffs contend that despite meeting and conferring with Defendant to determine whether
 9 retirement accounts have been properly established pursuant to the parties’ settlement of the ERISA
 10 claim, Defendant “has refused to provide disclosure of information sufficient to confirm the
 11 establishment of and the benefits under the Accounts for each of the eligible Class Members.”
 12 (Memo. ISO Motion at 1.) Plaintiffs also claim Defendant’s refusal violates certain provisions of
 13 ERISA, entitling them to civil penalties.

14 Defendant contends that neither the Settlement Agreement nor the Court’s final order required
 15 it to provide eligible class members with any information concerning their vested benefits. As such,
 16 Defendant argues this motion is not properly before the Court because Plaintiffs do not allege a breach
 17 of the Settlement Agreement or point to any specific language providing for the relief they seek.
 18 Moreover, Defendant argues Plaintiffs’ motion is a “new cause of action” for ERISA violations that
 19 falls outside the Court’s continuing jurisdiction to enforce the Settlement Agreement.

20 I. Jurisdictional Arguments

21 A. The Court’s Jurisdiction to Enforce the Agreement

22 In this case, pursuant to the Settlement Agreement and the Dismissal Order, the Court
 23 specifically retained “exclusive and continuing jurisdiction over the Litigation, Plaintiffs, all Class
 24 Members and Defendant, for purposes of supervising, implementing, interpreting and enforcing this
 25 Order and the Settlement Agreement.” Courts may properly reserve such continuing jurisdiction upon
 26 the dismissal of a case. Sandpiper Vill. Condo. Ass’n v. Louisiana-Pacific Corp., 428 F.3d 831, 841
 27 (9th Cir. 2005) (“The requisite independent basis for jurisdiction may be supplied by a provision in
 28 the settlement agreement and order that expressly retains jurisdiction in the district court for the

1 purpose of overseeing and enforcing the prior judgment. Such a provision . . . empowers a district
 2 court to protect its judgment from a subsequent action that frustrates the purpose of the settlement
 3 agreement and order.”) Defendant, however, contends the Court does not have continuing jurisdiction
 4 in this matter because Plaintiffs have not met their “burden” of demonstrating a breach of the
 5 agreement, citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994).

6 Kokkonen allows for a court’s continuing jurisdiction where “the parties’ obligation to comply
 7 with the terms of the settlement agreement ha[s] been made part of the order of dismissal . . . by
 8 separate provision (such as a provision “retaining jurisdiction” over the settlement agreement) . . . ”
 9 and provides that in such cases “a breach of the agreement would be a violation of the order, and
 10 ancillary jurisdiction to enforce the agreement would therefore exist.” Kokkonen, 511 U.S. at 381.
 11 Kokkonen does not, however, require a breach of a settlement agreement as a condition precedent to
 12 the Court’s exercise of its explicitly-reserved continuing jurisdiction to enforce that agreement. Here,
 13 because the plain language of the Court’s reservation of continuing jurisdiction does not require a
 14 party to show a breach of the agreement before invoking jurisdiction, the Court rejects Defendant’s
 15 argument.

16 B. The Court’s Jurisdiction Over Plaintiffs’ Newly-Raised ERISA Claims

17 On April 20, 2009, Plaintiffs’ counsel emailed a request for copies of the eligible class
 18 members’ individual quarterly benefits statements, as required by “ERISA 29 USC 1025(a).”⁴ In
 19 making this demand, Plaintiffs further cautioned that “ERISA 29 USC § 1132(c) imposes a penalty
 20 of \$110 per day on the Plan Administrator for failure to provide such a statement within 20 days
 21 following such a request.” (Ex. 5 to Blumenthal Decl.) Plaintiffs now argue that in failing to provide
 22 the requested information, Defendant has contravened the mandates of ERISA and is therefore liable
 23 for civil penalties pursuant to 29 U.S.C. § 1132(c).⁵

24
 25 ⁴ 19 U.S.C. § 1025 provides ERISA’s requirements for the administrator of a pension benefit
 26 plan to provide statements to plan participants. The Court does not reproduce the section here because
 27 the section is lengthy and its substantive contents are not material to the Court’s evaluation of the
 28 issues Plaintiffs raise in their motion.

⁵ Section 1132 provides for civil causes of action for various ERISA violations. Section
 1132(c) provides, *inter alia*, for civil penalties against a plan administrator for failure to comply with
 the provisions of § 1025(a).

1 Defendant characterizes Plaintiffs' contentions as a separate cause of action for alleged
2 violations of ERISA that occurred during the administration of the retirement accounts established by
3 the Settlement Agreement. Defendant argues this subject matter falls outside the scope of the Court's
4 continuing jurisdiction to enforce the Settlement Agreement. Plaintiffs do not respond to this
5 contention in their reply brief.

6 Plaintiffs cite to Shop Ironworkers Local 790 Pension Trust v. COFAB Steel Corp., 2009 U.S.
7 Dist. LEXIS 40758, at *3-4 (N.D. Cal. Apr. 30, 2009) for the proposition that "federal courts can
8 enforce settlement agreements when enforcing [them] 'require[s] the application of federal ERISA
9 law.'" (Memo ISO Motion at 2.) However that case is inapposite because it involved a *separate*
10 *action* to enforce the terms of a settlement agreement that "obligated Defendants to make payments
11 for withdrawal liability pursuant to the applicable provision of ERISA, specifically 29 U.S.C. § 1399."
12 Id. at *6. The Plaintiffs in Shop Ironworkers did not attempt to raise a new cause action in a case that
13 had already been dismissed. If Plaintiffs wish to allege new ERISA violations pursuant to the
14 administration of the retirement accounts, they should file a separate claim. Therefore, Plaintiffs'
15 motion is denied to the extent that it seeks penalties for ERISA violations.

16 II. Plaintiffs' Requested Disclosures

17 In light of the Court's continuing jurisdiction to supervise, implement, interpret and enforce
18 the Settlement Agreement, it must determine whether the disclosures Plaintiffs seek are required by
19 the Settlement Agreement. If not, the Court must determine whether the information is otherwise
20 required to ensure the agreement's enforcement. Plaintiffs' briefs set forth broad requests for
21 numerous types of disclosures and other actions on Defendant's part. At oral argument, Plaintiffs'
22 counsel clarified that he simply desires confirmation that an individual retirement account was
23 established for each eligible class member, a record of the amount funded to each account, and an
24 indication of whether the account holders were sent cash payout checks if their account balances were
25 below the \$1,000 account minimum. The Court accordingly limits its present inquiry to this clarified
26 request.

27 Defendant incorrectly believes it only had an obligation to "establish and/or contribute to a
28 401(k) retirement plan, which it did when it transferred funds to the Plan's Fidelity Investment

Account.” (Opp. at 7.) In fact, the Settlement Agreement provides that, “[t]he ERISA claim shall be settled by application of the Self-Correction Method set forth in the Internal Revenue Service’s Revenue Procedure 2006-27, Appendix A (‘the ERISA Settlement Consideration’), which will result in the establishment of and/or contribution to 401(k)/retirement *accounts* for eligible Class Members in amounts equal to their individual missed deferral opportunities.” (Settlement Agreement at 5-6, emphasis added.) The “Plan History Detail” Defendant produced to Plaintiffs does not show that it has established/contributed to individual 401(k) retirement accounts for eligible class members. It merely documents a lump sum transfer that created a pool of money, ostensibly to fund those accounts.

Moreover, the Settlement Agreement contains a “Mutual Full Cooperation” clause which provides, in relevant part:

The Parties agree to fully cooperate with each other to accomplish the terms of this Stipulation, including but not limited to, execution of such documents and to take such other action as may reasonably be necessary to implement the terms of this Stipulation. The Parties to this Stipulation shall use their best efforts, including all efforts contemplated by this Stipulation and any other efforts that may become necessary by order of the Court, or otherwise, to effectuate this Stipulation and the terms set forth herein.

(Settlement Agreement at 19-20.) In light of Defendant’s contractual obligation to establish and contribute to individual retirement accounts for eligible class members, and pursuant to the Settlement Agreement’s Mutual Cooperation clause, the Court ORDERS as follows:

- (1) Defendant shall produce documentation to Plaintiffs’ counsel showing that individual 401(k)/retirement accounts were established for all eligible class members. This documentation shall include the name of the individual(s) holding each account, and the corresponding amount funded to each account pursuant to the Settlement Agreement.
- (2) For all individual retirement accounts established pursuant to the Settlement Agreement whose account balances fell below the Plan’s \$1,000 minimum, and were subsequently liquidated by Fidelity, Defendant shall produce documentation to Plaintiffs’ counsel showing the name and address to which each individual cash payout was mailed, and the corresponding amount of each cash distribution check.
- (3) The documentation shall be in the format of Defendant’s choosing, so long as it is accurate, legible, and clearly identifies the funds provided to each qualifying class member.

(4) Defendant shall procure this information and produce it to Plaintiffs' counsel⁶ no later than **Friday, October 16, 2009**.


This Order does not require Defendant to provide information as to whether the eligible class members cashed their payout checks or locate any class members who have failed to cash their payout checks. The Class Notice apprised eligible class members of their duty under the Settlement Agreement to pursue information regarding the exercise of any vested benefits.⁷ This obligation was a bargained-for term of the Settlement Agreement that was of considerable value to Defendant because of the substantial cost and burden involved in sending out additional notices to all eligible class members regarding the exercise of any vested benefits. The Court finds that any cash distribution checks from liquidated retirement accounts comprised the type of "vested benefits" that eligible class members were affirmatively required to pursue on their own; an onus that logically includes the responsibility to inform Fidelity of their current contact information and to cash any disbursement checks they received. The Court declines to shift these responsibilities to Defendant.

CONCLUSION

The Court GRANTS Plaintiffs' motion in part, and DENIES it in part, as discussed herein. Defendant shall produce the documentation the Court has ordered to Plaintiffs' counsel no later than **Friday, October 16, 2009**.

IT IS SO ORDERED.

DATED: September 23, 2009


IRMA E. GONZALEZ, Chief Judge
United States District Court

⁶ At oral argument, defense counsel requested that the Court allow Defendant to make any required disclosures directly to the Court *in camera* as opposed to producing any information to Plaintiffs. The Court denies Defendant's request.

⁷ For example the Class Notice clearly states on page 4, "[Y]ou do not have to submit a Claim Form to obtain any vested benefits in any 401(k)/retirement account established in your name to satisfy any missed deferral opportunity. You may learn whether you have any vested benefits in a 401(k)/retirement account, what those vested benefits are, and how you may exercise those vested benefits by contacting Fidelity NetBenefits at www.401k.com or call the Fidelity Retirement Benefits Line at 1-800-835-5097." (See Class Notice, Ex. 1 to Blumenthal Decl.)